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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 72-140

CHARLES M. PEARSON,
Petitioner

versus

STATE OF FLORIDA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

MILTON E. GRUSMARK
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I N D E X

	Page
PETITION FOR WRIT OF CERTIORARI -------	1
REFERENCE TO OPINIONS AND ORDERS ------	1
GROUNDS FOR JURISDICTION OF THIS COURT-	2
QUESTION PRESENTED FOR REVIEW ---------	3
CONSTITUTIONAL PROVISIONS ------------	3
STATEMENT OF THE CASE ----------------	3
STATEMENT OF THE FACTS ---------------	4
ARGUMENT -----------------------------	6
CONCLUSION ---------------------------	8
CERTIFICATE OF SERVICE ---------------	9
APPENDIX A ---------------------------	10
APPENDIX B ---------------------------	14
APPENDIX C ---------------------------	16
APPENDIX D ---------------------------	18
APPENDIX E ---------------------------	19

AUTHORITIES

Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960) ----	6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

CHARLES M. PEARSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

CHARLES M. PEARSON, presents this Petition praying for the issuance of a Writ of Certiorari to the District Court of Appeal of Florida, Third District, to review the opinion of that Court affirming their conviction.

(a) REFERENCE TO OPINIONS AND ORDERS

Petition was adjudged guilty of manslaughter in the Criminal Court of Record in and for Dade County, Florida on May 9, 1970.

He was sentenced to three years at hard labor. Appendix A.

By its opinion of November 23, 1971, the District Court of Appeal, Third District, State of Florida, affirmed the conviction and adjudication. The opinion is reported at 254 So. 2d (D.C.A. 3rd Fla. 1971) and is appended to this petition as Appendix B.

Petition for a Writ of Certiorari was filed in the Supreme Court of Florida on December 21, 1971. It was denied after consideration of jurisdiction by order of March 20, 1972, not yet reported. The denial is attached as Appendix C.

The Supreme Court of Florida denied Petition for rehearing by its unreported order of April 26, 1972, attached as Appendix D.

The Supreme Court of Florida stayed proceedings until June 5, 1972, by its unreported order of May 4, 1972, attached as Appendix E.

(b) GROUNDS FOR JURISDICTION OF THIS COURT

Jurisdiction here is asserted under Title 28, U.S.C. Section 1257 (3). State Court action became final on April 26, 1972, the date upon which rehearing was denied by the Florida Supreme Court.

(i) The opinion sought to be reviewed was dated the 23rd day of November, 1971. It was entered on November 23, 1971.

(ii) The statutory provision applicable to jurisdiction in this case is Title 28, Section 1257(3), which states:

"By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

(c) QUESTION PRESENTED FOR REVIEW

IS A CONVICTION CONSTITUTIONALLY VALID WHEN IT IS ENTERED WITHOUT EVIDENCE THAT THE DEFENDANT AND NO ONE ELSE COMMITTED THE CRIME CHARGED

(d) CONSTITUTIONAL PROVISIONS

Amendment XIV to the Constitution of the United States provides in part:

".....nor shall any State deprive any person of life, liberty, or property without due process of law . . . . "

(e) STATEMENT OF THE CASE

On October 15, 1968, Petitioner and three other men were charged with manslaughter (R. 507)*.

* "R" refers to the record as filed in the District Court of Appeal of Florida, Third District.

Jury trial, held after entry of not guilty pleas (R. 509) resulted in conviction, adjudication, and sentencing to three years at hard labor of two defendants (R. 539-543). The two men convicted were petitioner and his brother.

Notice of appeal to the District Court of Appeal of Florida, Third District, resulted in an opinion of affirmance.

The Supreme Court of Florida denied certiorari.

(f) STATEMENT OF THE FACTS

On September 15, 1968, the deceased, JAMES LLOYD WHITE, visited Toni's Lounge in Dade County, Florida, at approximately 9:30 in the evening (R. 277).

WHITE, when first observed, was in the company of a girl identified only as ANN (R. 281). After complaining to a waitress about WHITE'S conduct, ANN left the lounge alone and did not return (R. 282). WHITE remained and became involved in altercations with several customers and employees of the lounge.

Witnesses testified that WHITE was in several fights, acted erratically and was ejected from the lounge several times before petitioner arrived on the scene at approximately 1:00 in the morning.

MARIE JACKSON, a waitress at the lounge (R. 276), testified that approximately five minutes after ANN left, WHITE approached her on a balcony and after making accusations, swung at her and fell off the balcony, striking his head on the tile floor below (R. 284-

286). CARL JACKSON, a musician who was performing at the time, confirmed these facts (R. 315).

MARIE JACKSON, CARL JACKSON and MICHAEL BARNES, all testified that WHITE stumbled and fell on the dance floor at least one or more times (R. 288, 316, and 146).

MARIE JACKSON and CARL JACKSON, who were working in different parts of the lounge, also saw WHITE pour a drink down a man's back. They said that the man turned and hurled WHITE against a wall, with WHITE'S head slamming into the wall (R. 316, 291).

There was also testimony by MARIE JACKSON and CARL JACKSON that WHITE was ejected from the lounge several times but returned each time through a back door (R. 289 and 316). Other testimony indicated that WHITE poured another drink down someone's back and was involved in shoving a man at the bar (R. 290 - 316).

At 1:15 in the morning, Petitioner arrived at Toni's Lounge (R. 289).

MICHAEL BARNES testified that he observed WHITE leave the lounge and that shortly thereafter four men, including Petitioner, also left through the same door (R. 147).

BARNES followed the four men outside and observed WHITE surrounded by them (R. 148). (It is not clear whether the two unidentified men were the two other defendants named in the Information although that would be a logical inference).

BARNES then said that a fight ensued and that the Petitioner was hitting WHITE

(R. 150), and that BARNES tried to stop the fight (R. 152). As BARNES jumped on Petitioner, the fighting stopped (R. 152). BARNES was told to mind his own business or the same would happen to him (R. 152).

Although BARNES stated that he was pinned flat on his back when he received this warning (R. 152), a passerby, DONNA HOLBEIN, observed him standing next to the body of WHITE (R. 188) and MRS. HOLBEIN further testified that no blows were being struck by anyone at that time.

At this point, an off-duty Police Officer, R. NORTON, arrived on the scene, summoned the Police and WHITE was taken to Jackson Memorial Hospital and pronounced Dead on Arrival (R. 199).

(g) ARGUMENT

Every element of a charge should be proven beyond a reasonable doubt. In the absence of such proof, any conviction entered fails to protect a defendant's rights under the due process clause. Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed. 2d 654 (1960).

Here it is incontrovertible that WHITE was in several altercations at the bar before Petitioner and the other men arrived.

It is undisputed that he was thrown into a wall striking his head. It is undisputed that he fell to the floor, down steps, hitting his head. It is true, and undisputed, that his conduct was peculiar.

All of the foregoing took place prior to the arrival of Petitioner and the other

men involved in the fight. No direct evidence proved that the foregoing did not cause WHITE'S death.

Circumstantially it is possible that mortal wounds were inflicted and the path to death started before Petitioner or the other men involved in the fight arrived.

Thereafter four men were in a fight with WHITE, Petitioner, his brother and two other men.

1. Petitioner may have struck a blow causing death. He may have struck a blow causing death following a mortal blow inflicted by another. But, it is equally possible that he did not strike a blow in any way leading to death.

2. Each of the other two original defendants are in the identical position as Petitioner and his brother.

3. There is no evidence indicating that more than one person is responsible for the death. Or that more than one person struck a mortal blow.

4. There is more evidence that Petitioner and his brother struck WHITE than that the other two men did. But there is no evidence that neither of the others did.

The Constitutional Rights of Petitioner are destroyed here when conviction was affirmed without evidence that he and no one else struck the mortal blow.

Circumstantial evidence would have resulted in a valid conviction if the circumstantial evidence showed that Petitioner and

no one else could have struck the mortal blow under the facts disclosed.

The due process clause requires such evidence either through direct or circumstantial proof excluding innocence.

Here neither type of evidence was presented to the jury.

Probability or possibility does not suffice to exclude the probability or possibility of guilt of another and not the convicted defendants.

Due process does not permit conviction of two brothers because one might have committed a crime or one probably did commit a crime. Both cannot be convicted under such circumstances, in order to insure the fact that one of them, who is probably guilty, is convicted.

CONCLUSION

We respectfully urge the issuance of the writ to the end that a conviction not consistent with the Constitutional Rights of Petitioners may ultimately be set aside.

Respectfully submitted,

MILTON E. GRUSMARK
Attorney for Petitioner
North Bay Professional Bldg.
1720-79th Street Cswy.,
Suite 110
Miami Beach, Florida 33141

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petition for Writ of Certiorari has been served on opposing counsel, by U. S. Mail, postage prepaid, this _____ day of July, 1972.

MILTON E. GRUSMARK

APPENDIX A

(And on July 2, 1970, the COURT entered its SENTENCE herein, as to the Defendant ROBERT LEE PEARSON, which said SENTENCE was duly filed and recorded on said date by the Clerk of the Court in Criminal Court of Record Minute Book No. 391, on Page 316, and is in the words and figures following, to-wit:)

BENCH DOCKET

Criminal Court of Record
Dade County, Florida

F I L E D
JUL 2 1970
J.F.McCRACKEN
CLERK E

STATE OF FLORIDA

VS

ROBERT LEE PEARSON

CHARGE, MANSLAUGHTER Case No. 68-5303-D

What have you to say why sentence should not now be imposed upon you?

Saying nothing that could influence the Court in its decision.

S E N T E N C E

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that you Robert Lee Pearson be imprisoned by confinement at hard labor in the STATE PENITENTIARY for a term of Three (3) Years.

DONE AND ORDERED in open Court at Miami, Dade County, Florida, this 2nd day of July A. D. 1970.

s/ EVERETT H. DUDLEY, JR.
Judge

Div. "E"

FILED AND RECORDED
IN THE CRIMINAL COURT OF RECORD
MINUTES AS INDICATED HEREON
J. F. McCracken, Clerk

By: KATHLEEN H. BRENNAN
Deputy Clerk

BOOK 391 PAGE 316

- - - - -

(And on July 2, 1970, the COURT entered its SENTENCE herein, as to the Defendant CHARLES M. PEARSON, which said SENTENCE was duly filed and recorded and said date by the Clerk of the Court in Criminal Court of Record Minute Book No. 391, on Page 315, and is in the words and figures following, to-wit:)

BENCH DOCKET

Criminal Court of Record

Dade County, Florida

F I L E D
JUL 2 1970
J.F.McCRACKEN
CLERK E

STATE OF FLORIDA

VS.

CHARLES M. PEARSON

CHARGE, MANSLAUGHTER Case No. 68-5303-C

What have you to say why sentence should not now be imposed upon you?

Saying nothing that could influence the Court in its decision.

S E N T E N C E

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that you, Charles M. Pearson, be imprisoned by confinement at hard labor in the STATE PENITENTIARY for a term of Three (3) Years.

DONE AND ORDERED in open Court at Miami, Dade County, Florida, this 2nd day of July A. D. 1970.

s/EVERETT H. DUDLEY, JR.
Judge

FILED AND RECORDED
IN CRIMINAL COURT OF RECORD
MINUTES AS INDICATED HEREON
J. F. McCracken, Clerk
By: KATHLEEN H. BRENNAN
Deputy Clerk

Div. "E"

BOOK 391 PAGE 315

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(And on July 2, 1970, the COURT entered herein its JUDGMENT OF CONVICTION as to the Defendant ROBERT LEE PEARSON, which said JUDGMENT was duly filed and recorded on said date by the Clerk of the Court in Criminal Court of Record Minute Book No. 391, on Page 275, and is in the words and figures following, to-wit:)

APPENDIX B

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

RECEIVED NOV 29 1971

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A. D. 1971.

ROBERT LEE PEARSON and
CHARLES M. PEARSON,

Appellants,

vs. CASE NO. 70-742

THE STATE OF FLORIDA

Appellee.

Opinion filed November 23, 1971.

An Appeal from the Criminal Court of Record for Dade County, Ellen J. Morphonios, Judge.

Milton E. Grusmark, for appellant.

Robert L. Shevin, Attorney General, and William L. Rogers (Legal Intern), for appellee.

Before PEARSON, and CHARLES CARROLL and HENDRY, JJ.

PER CURIAM

This is an appeal by the defendants below from conviction of manslaughter. The victim died following a beating by the appellants and two other men. Upon examining the record we conclude there is no merit to the appellants' argument as to insufficiency of the evidence. The contention of the appellants that the court erred by failing to give a certain charge relating to the elements of the offense is rejected. That contention was without the support of an assignment of thereon. See Municipal Court in and for Coral Gables v. Giblin, Fla. App. 1961, 126 So. 2d 285. No request was made to the court to so charge, and no objection was made with regard thereto at trial. See Brown v. State, Fla. 1968, 206 So. 2d 377, 384; Gibson v. State, Fla. App. 1967, 194 So. 2d 19,20. No error was committed by the trial court in allowing, over objection, the presentation of expert testimony, from an experienced pathologist licensed as a medical doctor in another state, upon determination of his competency by the trial court, notwithstanding he had not been licensed as a doctor in Florida. The question of competency of a doctor to so testify depends upon whether he is shown to have "such skill, knowledge or experience with respect to the subject matter about which he is called to testify that it appears to the trial court that his opinion will probably aid the jury in the resolution of an ultimate issue of fact." Seaboard Air Line R.Co. v. Lake Region Packing Assn, Fla. App. 1968, 211 So.2d 20-31; Copeland v. State, 58 Fla. 26, 50 So. 621, 624; Schley v. State, 48 Fla. 53, 37 So. 518, 519; Hayes v. United States, 10 Cir.1966, 367 F.2d 216.

Affirmed.

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1972

MONDAY, MARCH 20, 1972

ROBERT LEE PEARSON and
CHARLES M. PEARSON,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 41,883

DISTRICT COURT OF APPEAL, THIRD DISTRICT

This cause having heretofore been submitted to the Court on Petitioner for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, Acting Chief Justice, ADKINS, BOYD, McCAIN and DEKLE, JJ., concur

CC: Hon. W. P. Carter, Clerk
Hon. J. F. McCracken, Clerk
Hon. Ellen J. Morphonios, Judge

Hon. Milton E. Grusmark
(Hon. David B. Javits)
Hon. Robert L. Shevin, Miami
(Hon. Joseph R. DeLucca
Mr. William L. Rogers)

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

s/Kay D. Yent
D.C.

APPENDIX D

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1972
WEDNESDAY, APRIL 26, 1972

ROBERT LEE PEARSON and
CHARLES M. PEARSON,

Petitioners,

vs. CASE NO. 41,883

STATE OF FLORIDA,

Respondent.

On consideration of the Petition for Rehearing filed by attorney for petitioners,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

CARLTON, Acting Chief Justice, ADKINS, BOYD, McCAIN and DEKLE, JJ., Concur.

cc: Hon. W. P. Carter, Clerk
Hon. J. F. McCracken, Clerk
Hon. Ellen J. Morphonios, Judge
Hon. Milton E. Grusmark
Hon. Robert L. Shevin

A True Copy
TEST:
s/Sid J. White
Sid J. White
Clerk Supreme Court.

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ORDER OF MARCH 20, 1972.)

APPENDIX E

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1972
THURSDAY, MAY 4, 1972

ROBERT LEE PEARSON and
CHARLES M. PEARSON,

Petitioners,

vs. CASE NO. 41,883

STATE OF FLORIDA,

Respondent.

Petitioners' motion for stay is granted and proceedings in this Court and in the District Court of Appeal, Third District and the trial court are hereby stayed to and including June 5, 1972 to enable petitioners to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

CC: Hon. Milton E. Grusmark
(Hon. David B. Javits)
Hon. Robert L. Shevin
(Hon. Joseph R. DeLucca
Mr. William L. Rogers)
Hon. W. P. Carter, Clerk
Hon. J. F. McCracken, Clerk
Hon. Ellen J. Morphonios, Judge

A True Copy
TEST.
Sid J. White
Clerk Supreme Court.
By: s/Dave Lang Jr.
DAVE LANG, JR.
Chief Deputy Clerk
Supreme Court of Florida